87-240

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. _____

MARY CATHERINE MIZE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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35 pp

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause barred petitioner's second trial after the court of appeals found that the government had failed to prove an essential element of the offenses charged at petitioner's first trial.

2. Whether the court of appeals erred in applying a statute, 18 U.S.C. § 3161(d)(1), which was manifestly inapplicable to this case, where retrial was had following appellate reversal, and where the first indictment was dismissed during the second trial, upon the government's motion.

LIST OF PARTIES

The parties to the proceedings below and in this Court are petitioner, Mary Catherine Mize, and respondent, United States of America.

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NO. _____

MARY CATHERINE MIZE,
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v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mary Catherine Mize, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO OPINION BELOW

The opinion of the court of appeals has not yet been reported. The slip opinion is attached as appendix A. The order of the court of appeals denying petition for rehearing is attached as appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), after rendition of judgment by the United States Court of Appeals for the Fifth Circuit. The opinion of the court of appeals was rendered on June 15, 1987. Rehearing was denied on July 14, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Fifth Amendment to the United States Constitution and 18 U.S.C. § 3161(d)(1) and § 3161(e).

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

18 U.S.C. § 3161(d)(1) provides:

> If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal

episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

18 U.S.C. § 3161(e) provides:

If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final.

If the defendant is to be tried again following an appeal or collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial with seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

STATEMENT OF THE CASE

Mary Catherine Mize was first indicted in cause number G-84-3, a ten count indictment charging various violations of the federal laws alleged to have been committed by her, "an employee, that is, a teller at Angleton Bank of Commerce, a member bank of the Federal Reserve

System." [RII—139-146]. After hearing evidence, a jury convicted petitioner of all counts alleged in the indictment, and subsequently, the court assessed punishment at 5 years imprisonment, to be followed by 5 years probation, and restitution in the amount of $10,000.00 payable to the Angleton Bank of Commerce. [R.II—147]

Petitioner appealed this original conviction, contending both that the evidence was insufficient to establish that the Angleton Bank of Commerce was "a member bank of the Federal Reserve System," and that the trial court had constructively amended the indictment by authorizing a conviction upon a finding that the bank was an "insured bank" rather than a "member bank", as charged in the indictment. [RII—148-169]

An examination of the record of the first trial on cause number G-84-3 reveals that the government presented *no proof whatsoever* that the Angleton Bank of Commerce was a "member bank" as alleged in that indictment. Instead, it proved that the bank was an "insured bank." [R.III—147-148; II—32]

On direct appeal the United States Court of Appeals for the Fifth Circuit reversed the judgment of conviction, noting at least five times in the opinion that the government had failed to prove this essential jurisdictional element. *United States v. Mize,* 756 F.2d 353, 354, 355, 356, 357 (5th Cir. 1985). Despite repeatedly pointing out the government's total failure to prove an element of the offense, the court went on to note that the reversal was "subject to reindictment and retrial." *Id.* at 354. The mandate issued on May 20, 1985.

On February 5, 1986 petitioner was reindicted in cause number G-86-3, this indictment also consisting of ten

counts and purporting to charge the identical violations as the first indictment, except that the new indictment alleged that the bank was an "insured bank." [R.II—194] The government took no action to bring petitioner to trial between the reversal and the second indictment. When asked by the trial court the reason for the nine month delay between the issuance of the mandate and the reindictment, the assistant United States Attorney responsible for the case said:

> I don't have a good reason for it, Your Honor. All I can point to is that it was negligence on the part of the Government in failing to do so.

[R.III—9]

The first indictment, which alleged "member bank", remained pending throughout this nine month period. It was finally dismissed on the government's motion on April 18, 1986, after the trial on the second indictment had commenced. [R.IV—627]

Once again, petitioner was convicted on all ten counts, and again she was fined, and sentenced to five years imprisonment, to be followed by five years probation. [R.I—10]

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

A.

Prior to commencement of the second trial, petitioner filed her Motion to Dismiss Number One, with attached Exhibits A through E, and Memorandum in Support of Motion to Dismiss Number One. [R.II—134, 127] This

motion contended that principles of double jeopardy barred retrial since the appellate court had determined the evidence insufficient at the first trial. *See Burks v. United States,* 437 U.S. 1, 17 (1978). A hearing was held on this motion on March 31, 1986, at which time the trial court took judicial notice of the record of the previous trial, including the statement of facts, and defendant's exhibits A-E. [R.III—2-3] After receiving evidence and hearing arguments of counsel, the trial court overruled Motion to Dismiss Number One. [R.III—15; I—75]

Petitioner immediately filed notice of interlocutory appeal from the order denying her Motion to Dismiss Number One. [R.I—87; III—15] *See Abney v. United States,* 431 U.S. 651 (1977). The trial court orally stated that Motion to Dismiss Number One was without substance and denied leave to appeal its order denying Motion to Dismiss Number One. [R.III—16; I—77]

Petitioner next filed a written Motion for Stay Pending Appeal in which she sought a stay of the order denying her Motion to Dismiss Number One, and a stay of commencement of trial, pending appeal of the order denying Motion to Dismiss Number One. [R.I—80] The trial court denied the motion for stay. [R.III—17]

Prior to commencement of trial, in light of the trial court's refusal to stay the trial pending appeal to the court of appeals, petitioner filed a motion for stay pending appeal, and a petition for writ of mandamus, with the court of appeals. Both motion and petition were denied on April 9, 1986.

The second trial commenced on April 15, 1986 and concluded on April 18, 1986. [R.IV—26-32] Petitioner

was sentenced on May 7, 1986. [R.VII—2] Direct appeal was taken to the United States Court of Appeals for the Fifth Circuit.

The court of appeals rejected petitioner's double jeopardy contention, holding that it was bound by the law of the case doctrine because of an earlier holding in petitioner's first appeal, *United States v. Mize,* 756 F.2d 353 (5th Cir. 1985). *United States v. Mize,* No. 86-2353 (5th Cir. June 15, 1987), slip op. 4. The court also rejected petitioner's argument that the law of the case doctrine was inapplicable because its original decision was manifestly erroneous and unjust. The court recognized that *Burks v. United States,* 437 U.S. 1 (1978) only bars retrial where the original reversal is based on evidentiary insufficiency. And, according to the court:

> We specifically held in the first appeal that "our reversal is not predicated on evidentiary sufficiency." We found no problem in the sufficiency of the government's proof; the government presented convincing proof of *every* element of the charged offenses. The only problem was that the government proved and the trial judge instructed the jury on an element different than that charged in the indictment.

United States v. Mize, No. 86-2353 (5th Cir. June 15, 1987), slip op. 4.

B.

Petitioner's Motion to Dismiss Number Two sought dismissal for violation of the Federal Speedy Trial Act, 18 U.S.C. § 3161, et seq., based on the nine month delay between mandate and retrial. Evidence was heard on this motion, and it was overruled by the trial court. [R.III—13; I—74]

In the court of appeals, the question was whether the case was governed by 18 U.S.C. § 3161(e) or 18 U.S.C. § 3161(d)(1). If § 3161(e) applies, retrial was barred, since trial occurred 330 days after the court's decision on the first appeal became final. If, on the other hand, § 3161(d)(1) applies, retrial was not barred. *United States v. Mize,* No. 86-2353 (5th Cir. June 15, 1987), slip op. 6-7.

Petitioner contended that § 3161(e) applies on its face, because this case involves retrial after appeal. The government argued that the *effect* of the first decision on appeal had been to dismiss the first indictment, thereby calling into play § 3161(d)(1). The court of appeals agreed with the government.

> The question we must decide is a *novel* one. We have found no cases in this Circuit or elsewhere that involve similar facts. After examining the purpose of the Act and the effect of our previous decision, we hold that subsection (d)(1), not subsection (e), applies here.

Id. at 7 (emphasis supplied). According to the court, the "effect" of its first appellate decision was to dismiss the original indictment. Thus, even though the first indictment was *in fact* not dismissed until well into the second trial, it had been in effect dismissed on appeal. And, because the indictment had been dismissed on appeal, § 3161(d)(1) applied to toll the running of the Act until reindictment. Since trial occurred 69 days after reindictment, the Act was not violated. *United States v. Mize,* No. 86-2353 (5th Cir. June 15, 1987), slip op. 8-9.

REASONS FOR GRANTING THE WRIT

A.

THE COURT OF APPEALS ERRED IN VIOLATION OF *BURKS V. UNITED STATES*, 437 U.S. 1 (1978) IN HOLDING THAT PETITIONER'S SECOND PROSECUTION WAS NOT BARRED BY DOUBLE JEOPARDY WHERE THAT COURT HAD PREVIOUSLY FOUND THAT THE GOVERNMENT HAD FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE OFFENSES CHARGED AT THE FIRST TRIAL.

This writ should be granted because the decision below is contrary to this Court's decision in *Burks v. United States*, 437 U.S. 1 (1978). It is also contrary to decisions by the Fifth and Seventh Circuit Courts of Appeals. *See United States v. Shively*, 715 F.2d 260 (7th Cir. 1983); *United States v. Platenburg*, 657 F.2d 797 (5th Cir. 1981).

To avoid confusion, the first decision, *United States v. Mize*, 756 F.2d 353 (5th Cir. 1985), will be referred to as *Mize I*. The opinion below, *United States v. Mize*, No. 86-2353 (5th Cir. June 15, 1987), will be referred to as *Mize II*.

In *Mize I*, the court pronounced that its "reversal is not predicated on evidentiary sufficiency." *United States v. Mize I, supra*, 756 F.2d at 357 n.7. The *Mize II* court attached great significance to this pronouncement when finding against petitioner below. *United States v. Mize II, supra*, slip op. 4. The proper question here is whether this mere conclusory pronouncement should be given effect over the *Mize I* opinion taken as a whole. Petitioner submits that the proper interpretation of *Mize I* requires

that it be viewed as a whole. Such review reveals that the court noted a failure of proof in five different places in the opinion. Specifically,

> Because the government *failed to prove* that the defrauded bank was a "member bank of the Federal Reserve System" as specifically alleged in each count of the indictment, and the district court erroneously instructed the jury on this issue, we must reverse Mize's conviction, subject to reindictment and retrial.

United States v. Mize, 756 F.2d 353, 354 (5th Cir. 1985) (emphasis supplied).

> Each count of the indictment specifically alleged that the bank was a "member bank of the Federal Reserve System." *The government, however, did not prove this allegation.*

Id. at 355. (emphasis supplied).

> The statutes' requirement of federally protected status for a bank serves a dual purpose, constituting both a jurisdictional predicate and *an essential substantive element of the criminal offenses.*

Id. at 356. (emphasis supplied).

> Although the indictment alleged that the bank was a "member bank," the government at trial *proved only* that the bank was an "insured bank."

Id. (emphasis supplied).

> The *failure of the government to prove the essential jurisdictional element* of the charges against Mize *and* the district court's constructive amendment of the indictment at trial require us to reverse Mize's conviction.

Id. at 356-57. (emphasis supplied).

In light of this language, it is plain that the first reversal was predicated on insufficiency of the evidence. Accordingly, retrial is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *Burks v. United States,* 437 U.S. 1 (1978). The nominal language to the contrary in *Mize I* is clearly erroneous.

In light of this determination of evidentiary insufficiency by the court of appeals in *Mize I, Burks v. United States* clearly bars retrial. The rationale behind *Burks* is clear.

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."

Burks v. United States, supra, 437 U.S. at 118. Having once failed to prove its case, the government is not permitted "the proverbial 'second bite at the apple.'" *Id.* at 17.

> This prohibition, lying at the core of the clause's protections, *prevents the state from honing its trial strategies and perfecting its evidence through successive attempts at conviction.* Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.

Tibbs v. Florida, 457 U.S. 31, 41 (1982). (emphasis supplied).

The vice warned of in *Tibbs* is precisely the one complained of here. In cause number G-84-3 the government alleged "member bank" status. Its own witnesses and evidence failed to prove this, however. Then, some two years after that indictment, the government, after "honing its trial strategies and perfecting its evidence," presented a new indictment, and obtained another conviction. This sort of prosecutorial "perseverance" is condemned by the Double Jeopardy Clause of the Fifth Amendment.

The decision below is also irreconcilable with *United States v. Platenburg,* 657 F.2d 787 (5th Cir. 1981) and *United States v. Shively,* 715 F.2d 260 (7th Cir. 1983). In *Platenburg* the government failed to establish at appellant's first trial that the bank in question was insured by the Federal Deposit Insurance Corporation. Because the government failed to prove this essential element, the court of appeals reversed the conviction and dismissed the indictment, citing *Burks v. United States.*

> Proof of this status is not a mere formality, it is an essential element of the federal offense charged in the case before us. Indeed, federal jurisdiction depends on this status.
>
> * * *
>
> The government must prove beyond a reasonable doubt that the . . . Bank . . . was insured by the FDIC in 1979 when the charged criminal acts occurred.

Id. 799. The opinion below did not mention *Platenburg.* Petitioner can see no distinction between *Platenburg* and the present case. In *Platenburg,* the appellant was ordered acquitted. Here she was retried and convicted.

On the one hand, *Mize II* holds that "the government presented convincing proof of every element of the charged offenses." In the next sentence, however, the court acknowldges that "the government proved . . . an element different than that charged in the indictment." *United States v. Mize II, supra,* slip op. 4.

Petitioner respectfully submits that this is paradoxical. Both sentences cannot be true. In fact, the government did not prove every element at the first trial. It did not prove that the bank was a member bank, as alleged in the indictment. It was only able to prove its case after being afforded a second, and forbidden, bite at the apple.

The decision in *Mize II* conflicts with this Court's holding in *Burks v. United States,* as well as with holdings from the Fifth and Seventh Circuits. Certiorari should be granted to eliminate this conflict.

B.

THE COURT OF APPEALS ERRED IN HOLDING THAT 18 U.S.C. § 3161(d)(1) APPLIES HERE WHERE RETRIAL WAS HAD FOLLOWING APPELLATE REVERSAL, AND WHERE THE FIRST INDICTMENT WAS DISMISSED DURING THE SECOND TRIAL, UPON THE GOVERNMENT'S MOTION.

The court of appeals characterized petitioner's speedy trial contention as a "novel one." Petitioner respectfully submits that the contention is not novel at all. The only thing novel was the court's treatment of this issue.

The relevant provision is 18 U.S.C. § 3161(e). This provision is clearly applicable *on its face.* It provides in pertinent part:

> If the defendant is to be tried again following an appeal . . . the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical.

Here, petitioner was "tried again following an appeal." Here, undisputedly, the trial did not commence within "seventy days from the date the action occasioning the retrial becomes final," that is, the mandate. *See United States v. Cook*, 592 F.2d 877, 880 (5th Cir. 1979). Petitioner contended on appeal that § 3161(e) was violated, and that, pursuant to 18 U.S.C. § 3162, she was accordingly entitled to have her indictment dismissed.

The court below agreed that "if subsection [3161] applies here, Mize's retrial clearly violated the Act." *United States v. Mize II, supra*, slip op. 6. The court went on to hold, however, that "[a]fter examining the purpose of the Act and the effect of our previous decision, we hold that subsection [3161](d)(1), not subsection [3161](e), applies here." *United States v. Mize II*, slip op. 6. Accordingly the court rejected petitioner's contention.

Petitioner respectfully submits that there was no need for the court of appeals to examine "the purpose of the Act." As pointed out above, § 3161(e) plainly applies on its face. Just as plainly, § 3161(d)(1) does not apply. The latter section provides:

> If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with the respect to such subsequent complaint, indictment, or information, as the case may be.

Here, it is undisputed that the indictment was never dismissed on motion of the defendant as required by § 3161(d)(1). Instead, it was dismissed after the second trial began, on April 18, 1986, on motion of the *government.* [R.VI—627] *See United States v. Harris,* 724 F.2d 1452, 1454 (9th Cir. 1984) (§ 3161(d)(1) inapplicable where second indictment filed before first indictment dismissed).

Considering both the plain applicability of § 3161(e), and the plain inapplicability of § 3161(d)(1), there was simply no call for the court to look to the purpose or "clear intent" of the Speedy Trial Act. The court has incorrectly decided that § 3161(e) is not applicable to a fact situation which expressly fails within its purview. This is a question of exceptional importance which merits review by this Court. Certiorari should be granted to correct the court of appeals' misconstruction of the Speedy Trial Act.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing petition for writ of certiorari were mailed to the United States Attorney's Office, 515 Rusk Avenue, P. O. Box 61129, Houston, Texas, and to Mr. Maury S. Epner, Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899, on this the 13th day of August, 1987.

Mark Stevens

MARK STEVENS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2353

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARY CATHERINE MIZE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(June 15, 1987)

Before WISDOM, WILLIAMS, and HILL, Circuit Judges.

WISDOM, Circuit Judge:

This case comes before us for a second time. On the first appeal, we reversed the conviction of the defendant, Mary Mize, because of a constructive amendment of the indictment at trial. After being reindicted and retried, Mize appeals her second conviction, contending that her second trial was prohibited by the double jeopardy clause and the Speedy Trial Act. We find that her double jeopardy claim was foreclosed by our decision in her previous appeal and that her retrial began within the time limitations provided by the Speedy Trial Act. Accordingly, we affrm.

I.

The defendant, Mary Catherine Mize, was originally indicted by a federal grand jury on seven counts of embezzlement and misapplication of bank funds in violation of 18 U.S.C. § 656 and three counts of making false bank entries in violation of 18 U.S.C. § 1005. The evidence at the first trial convincingly proved that Mize, while head teller at the Angleton Bank of Commerce, made an unauthorized withdrawal from the account of one customer, wrote bogus checks on the account of another, and misappropriated numerous deposits of a third customer. The government also introduced evidence proving that the Angleton Bank was insured by the Federal Deposit Insurance Corporation. This proof was necessary to satisfy the jurisdictional element of sections 656 and 1005: that the wrongful act be committed against either a Federal Reserve Bank, a member bank of the Federal Reserve, a national bank, or an insured bank (insured by the F.D.I.C.). The judge instructed the jury in accordance with the proof presented at trial and the jury returned a verdict of guilty on all ten counts. She was sentenced to concurrent five year terms of imprisonment on five of the counts and to concurrent five year terms of probation on the five remaining counts, to commence following her release from prison. She was also ordered to pay restitution totaling $10,000.

On appeal from this first conviction, we were compelled to reverse because of a constructive amendment of the indictment concerning the essential jurisdictional element of the offenses charged. The indictment alleged that Angleton Bank was a member bank of the Federal Reserve. At trial, however, the government proved an alternative jurisdictional base—that Angleton Bank was

an *insured* bank. Because her first conviction rested upon a jurisdictional basis different from that charged in the indictment, we reversed. We added, however, that Mize was "subject to reindictment and retrial"[1] and that "[r]etrial of Mize is not prohibited by the double jeopardy clause of the Fifth Amendment because our reversal is not predicated on evidentiary sufficiency".[2]

We issued our mandate in the first appeal on May 20, 1985. On February 5, 1986, 261 days later, the government filed its second indictment against Mize on the original ten counts; this time, however, the indictment alleged that the Angleton Bank was an insured bank. On April 15, 1986, sixty-nine days later, Mize's second trial began. She moved to dismiss the proceedings, contending that the second trial was barred by the double jeopardy clause and the Speedy Trial Act. Her motions were denied, a jury convicted her on all counts, and once more she was sentenced to five years of imprisonment, a five year term of probation, and was ordered to pay restitution of $10,000. Mize appeals again.

II.

We find no merit in Mize's first argument: that the double jeopardy clause barred her second trial. In our earlier opinion reversing her conviction, this Court expressed its "great reluctance for . . . [her] guilt was established beyond a reasonable doubt." Anticipating her argument in this case on double jeopardy, we specifically held in our previous decision that "[r]etrial of Mize is not prohibited by the double jeopardy clause." Our

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1. *United States v. Mize,* 756 F.2d 353, 354 (5th Cir. 1985).

2. *Id.* at 357 n.7.

ruling in the earlier proceeding became the law of the case and we are bound to conform to it in this proceeding.[3]

Mize argues that we should disregard our previous ruling because it is "manifestly erroneous and unjust".[4] We find nothing erroneous or unjust in our earlier ruling. In *Burks v. United States*,[5] the Supreme Court held that the double jeopardy clause does not prevent the government from retrying a criminal defendant after her conviction is reversed on appeal *unless* the reversal is based on the insufficiency of the evidence.[6] We specifically held in the first appeal that "our reversal is not predicated on evidentiary sufficiency."[7] We found no problem in the sufficiency of the government's proof; the government presented convincing proof of *every* element of the charged offenses. The only problem was that the government proved and the trial judge instructed the jury on an element different than that charged in the indictment.

Moreover, we are bound by the decision of another panel of this Court rendered in *United States v. Fitzpatrick*.[8] The *Fitzpatrick* panel faced almost the identical question before us today. Fitzpatrick was indicted for robbing a federally *insured* savings and loan bank. The trial judge instructed the jury differently, however; he charged the jury with determining whether Fitzpatrick

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3. *United States v. 8.41 Acres of Land*, 783 F.2d 1256, 1259 (5th Cir.), *cert. denied*, 107 S. Ct. 85, 93 L.Ed.2d 38 (1986).

4. *See id.*

5. 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978).

6. *Id.* at 15-17, 98 S. Ct. at 2149-50, 57 L.Ed.2d at 12-13.

7. 756 F.2d at 357 n.7.

8. 581 F.2d 1221 (5th Cir. 1978).

robbed a federally *chartered* savings and loan—an alternative jurisdictional base provided in the relevant statute. The panel reversed his conviction because of the constructive amendment of the indictment, but held: "Retrial of the defendant is not prohibited by the Double Jeopardy Clause of the Fifth Amendment since our reversal is not predicated on evidentiary sufficiency."[9] We cited *Fitzpatrick* in our first decision in this case.[10] We are bound to follow the earlier decisions of other panels in this Circuit that are directly on point.[11] Mize's retrial was not prohibited by the double jeopardy clause.

III.

Mize argues that her retrial began beyond the seventy-day time limit of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.* Specifically, she argues that section 3161(e) applies here:

> If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. . . .

Our decision in the first appeal became final for purposes of the Speedy Trial Act on May 20, 1985, the day we issued our mandate.[12] The retrial began 330 days later.

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9. *Id.* at 1224 n.4.

10. 756 F.2d at 357 n.7.

11. *Umphlet v. Connick*, No. 86-3089, slip op. 3673, 3675 (5th Cir. May 6, 1987); *Victorian v. Miller*, 796 F.2d 94, 95-96 (5th Cir. 1986).

12. *United States v. Cook*, 592 F.2d 877, 880 (5th Cir.), *cert. denied*, 442 U.S. 921, 99 S. Ct. 2847, 61 L.Ed.2d 289 (1979).

Therefore, if subsection (e) applies here, Mize's retrial clearly violated the Act.[13] If any subsection of section 3161 is violated, section 3162 mandates that the charges be dismissed, leaving to the court's discretion the decision to dismiss with or without prejudice.

The government contends that subsection (e) does not apply because our first decision effectively dismissed the first indictment. Therefore, it argues, the seventy-day limitation did not begin to run until Mize was reindicted, as provided by subsection (d)(1):

> If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint . . . or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

In this case, application of subsection (d)(1) routes us to subsection (c)(1), which provides:

> [T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date . . . of the information or indictment. . . .

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13. Certain periods of delay, defined in § 3161(h), are excluded from the computation of the seventy-day period of § 3161(e). The government concedes that none of these excludable periods are involved in this case.

In short, if subsection (d)(1) applies, the government complied with the Act because it retried Mize within sixty-nine days of her reindictment—one day within the seventy day limitation.

The question we must decide is a novel one. We have found no cases in this Circuit or elsewhere that involve similar facts. After examining the purpose of the Act and the effect of our previous decision, we hold that subsection (d)(1), not subsection (e), applies here.

We begin with observing that the purpose of the Act is to ensure the defendant's sixth amendment right to a speedy trial.[14] This right is implicated only when a defendant is facing pending and live charges, whether by an indictment, an information, or a complaint.[15] If the indictment is dismissed or the charges are otherwise dropped, the defendant is no longer protected by the speedy trial clause.[16] Nor does the speedy trial clause protect the defendant threatened with reindictment and retrial, even if that threat is a matter of public record and virtually certain to materialize.[17]

Congress incorporated these constitutional principles into the Speedy Trial Act. The seventy-day time limit for trial begins to run no earlier than the date of indictment. § 3161(c)(1). If the government dismisses the indictment on its own motion, the delay between the

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14. *United States v. Horton*, 705 F.2d 1414, 1416 n.5 (5th Cir.), *cert. denied*, 464 U.S. 997, 104 S. Ct. 496, 78 L.Ed.2d 689 (1983).

15. *United States v. MacDonald*, 456 U.S. 1, 6-10, 102 S. Ct. 1497, 1501-02, 71 L.Ed.2d 696, 702-04 (1982).

16. *Id.*

17. *United States v. Loud Hawk*, 474 U.S. 302, 106 S. Ct. 648, 654, 88 L.Ed.2d 640, 652 (1986); *United States v. MacDonald*, 456 U.S. 1, 8-9, 102 S. Ct. 1497, 1502, 71 L.Ed.2d 696, 704 (1982).

dismissal and the filing of a subsequent indictment is excluded from the seventy-day period. § 3161(h)(6). Although subsection (d)(1) speaks in terms of a dismissal "upon motion of the defendant", courts have interpreted this subsection as starting a new seventy-day period whenever the indictment is dismissed, other than by the government's motion, and a new indictment is later filed.[18] Although the Act is somewhat awkwardly structured, its clear intent is to limit its protection to defendants who face pending and live indictments or charges.[19]

Turning to our previous decision, we find that its effect requires that subsection (d)(1) apply here. We specifically held that the retrial of Mize must be proceeded by the filing of a new indictment. The government obviously could not have proceeded to retry Mize on the first indictment. Once the government had constructively amended the first indictment by proving an alternative base of jurisdiction, collateral estoppel or double jeopardy would have precluded any further proceedings on that indictment.[20] Because our reversal of Mize's conviction

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18. *United States v. Feldman*, 788 F.2d 544, 549 (9th Cir. 1986); *United States v. Rubin*, 733 F.2d 837, 840 (11th Cir. 1984).

19. The sole concern of the Act with "speedy indictments" arises in § 3161(b), which requires that an indictment or information be presented within 30 days of an initial arrest. This provision is not applicable here, nor does Mize rely on it in any way.

20. *See Burks*, 437 U.S. at 11, 98 S. Ct. at 2147, 57 L.Ed.2d at 9; (double jeopardy clause gives government only one opportunity to prove allegations of indictment); *United States v. Gonzalez*, 548 F.2d 1185, 1191 (5th Cir. 1977) (collateral estoppel prevents government from relitigating facts decided in earlier trial); *United States v. Maker*, 751 F.2d 614, 624 (3d Cir. 1984) (appropriate remedy for substantial variance between indictment and proof is dismissal of the indictment), *cert. denied*, 472 U.S. 1017, 105 S. Ct. 3479, 87 L.Ed. 2d 614 (1985).

and the effective dismissal of the original indictment was not prompted by the government's motion (indeed, it was at Mize's urging), the later filing of the second indictment began a new seventy-day period under subsection (d)(1).[21]

Mize argues that the first indictment was not technically dismissed until after the second indictment was filed, when the trial judge *sua sponte* urged the government to dismiss it on the last day of the second trial. Under subsection (d)(1), the government receives a new seventy-day period only if the superceding indictment is filed *after* the dismissal of the first.[22] In the circumstances of this case, however, the dismissal of the first indictment during the second trial was an inconsequential, ministerial act. Certainly, Mize could not be held accountable on that indictment, and had she desired, she could have had it formally dismissed at any time.[23]

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21. *See* note 18 and accompanying text.

22. *See United States v. Mitchell,* 723 F.2d 1040, 1045 (1st Cir. 1983); *United States v. Gleason,* 766 F.2d 1239, 1245 (8th Cir. 1985), *cert. denied,* 106 S. Ct. 801, 88 L.Ed.2d 777 (1986); *United States v. Harris,* 724 F.2d 1452, 1454 (9th Cir. 1984).

23. In *United States v. Hutchins,* No. 86-2524, slip op. 4293 (5th Cir. May 19, 1987), we recently rejected the argument that the Speedy Trial Act "clock" continues to run until all ministerial acts necessary to fully effect the dismissal of the indictment and the release of all "restraints" on the defendant are completed by the district court. Our remarks in *Hutchins* are applicable here:

> In this case the first indictment against the appellants was dismissed. When it dismissed the indictment, the district court failed to exonerate the bail of the appellants. This was no more than a technical oversight on the district court's part, and we have no indication from the record that the appellants took any steps to correct the situation. It is clear that no charges were pending against them, that they were not accused under the law, that they were not under arrest, and there is no evidence that their movement was restrained in any practical way. Under

Alternatively, if we accept Mize's reasoning—that subsection (d)(1) is inapplicable because we had not specifically ordered dismissal of the first indictment—we would be compelled to conclude that subsection (e) does not apply either because we had not specifically ordered a retrial. Subsection (e) requires trial to begin within seventy days only "[i]f the defendant *is to be* tried again". We did not, however, remand Mize's case for a new trial. The district court certainly could not have retried the case after our reversal unless the government obtained a new and valid indictment. Therefore, following Mize's own reasoning, neither subsection (d)(1) or (e) applies and Mize has no Speedy Trial Act claim.

The judgment of the district court is AFFIRMED.

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these circumstances, it would be most inappropriate to hold that the Speedy Trial Act clock continued to run after dismissal of the first indictment. The technical failure of the district court to exonerate bail after dismissal of the indictment, unaccompanied by efforts of the appellants to correct it, cannot be equated with any status that triggers the Speedy Trial Act. Accordingly, we conclude that the Speedy Trial Act ceased to run when the district court dismissed the first indictment against the appellants on April 8, 1985, and did not begin to run anew until the superseding indictment against the appellants was returned on May 3, 1985.

Slip op. at 4297-98.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2353

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARY CATHERINE MIZE,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion JUNE 15, 1987, 5 Cir., 198__, ____F.2d____)

(July 14, 1987)

Before WISDOM, WILLIAMS and HILL, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having

requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. WILLIAMS
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-240

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARY CATHERINE MIZE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that her second trial was barred by the Double Jeopardy Clause and that it was untimely under the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*

1. Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on seven counts of embezzling and misapplying bank funds, in violation of 18 U.S.C. 656, and on three counts of making false entries in bank records, in violation of 18 U.S.C. 1005. She was sentenced to concurrent terms of five years' imprisonment on five of the counts and to five years' probation on the remaining counts. The court of appeals reversed because of a variance between the allegations in the indictment and the proof at trial. Specifically, the indictment alleged that the bank involved was a "member bank of the Federal Reserve System," but the government instead proved at trial that the bank was insured by the Federal Deposit Insurance Corporation. 756 F.2d 353 (1985). Although proof of either fact was sufficient to establish a violation of the statutes under

which petitioner was charged, the court held that it was reversible error for the government to charge one theory in the indictment and rely on the other at trial. The court of appeals noted, however, that a second trial would not be barred by the Double Jeopardy Clause because petitioner's "guilt was established beyond a reasonable doubt" (756 F.2d at 357 & n.7). Accordingly, the court reversed petitioner's conviction "subject to reindictment and retrial" (*id.* at 354). The mandate issued on May 20, 1985.

On February 5, 1986, a second ten-count indictment was returned that again charged petitioner with misapplying bank funds and making false entries. Unlike the first indictment, the second indictment alleged that the bank was federally insured. A jury trial commenced within 69 days of the return of the second indictment. During trial, the original indictment was formally dismissed. Petitioner was convicted on all ten counts of the new indictment, and she was given the same sentence that she had received after the first trial.[1]

2. The court of appeals affirmed. The court rejected petitioner's claim that her retrial was barred by the Double Jeopardy Clause (Pet. App. 3a). In the first appeal, the court noted, it had held that the reversal of petitioner's conviction was not based on evidentiary insufficiency; "the government [had] presented convincing proof of *every* element of the charged offenses" (*id.* at 4a (emphasis

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[1] The evidence at the second trial, as summarized in the government's brief in the court of appeals, showed that petitioner was the head teller at the Angleton Bank of Commerce in Angleton, Texas, a federally insured bank. On November 9, 1981, petitioner withdrew $25,000 from the account of bank customer Grace Ford without Ford's knowledge or authorization. Then, between May 15 and June 4, 1982, petitioner forged five checks, totalling $20,000, on the account of customer Mary Orsak and kept the proceeds for herself. Finally, in March 1983, petitioner misappropriated nine deposits, totaling $34,000, that belonged to the Southland Corporation.

in original)). Instead, the court had reversed her original convictions because "the government proved and the trial judge instructed the jury on an element different than that charged in the indictment," namely that the Angleton Bank was an "insured bank" rather than a "member bank" (*ibid.*). Therefore, the court held, the Double Jeopardy Clause did not prohibit the government from reprosecuting petitioner on a new indictment.

The court also rejected petitioner's claim that her second trial did not commence within the time limits of the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.* Petitioner argued that she should have been tried within 70 days of the issuance of the court's mandate reversing her original convictions. The 70-day time limit of the Act did not start anew with the return of the second indictment, she claimed, because at that time the original indictment was still outstanding. Because 330 days had elapsed between the issuance of the mandate and the commencement of the second trial, petitioner claimed that the Act was violated.

The court of appeals disagreed. The court noted that pursuant to Section 3161(d)(1) of the Act, the return of a superseding indictment triggers a new 70-day period for commencing trial whenever the original indictment is dismissed "upon motion of the defendant" (Pet. App. 5a-10a). Here, it was at petitioner's urging that the court of appeals, in its first decision, had reversed her convictions "subject to reindictment and retrial" (756 F.2d at 354). The court of appeals thus effectively dismissed the first indictment in its disposition of the first appeal (Pet. App. 8a-9a). Accordingly, the court reasoned, the formal dismissal of the original indictment during the second trial was nothing more than an "inconsequential, ministerial act" (*id.* at 9a). Had petitioner desired, "she could have had the [original indictment] formally dismissed at any time" (*ibid.* (footnote omitted)).

The court rejected petitioner's argument that this case should be controlled by Section 3161(e), which requires that trial commence within 70 days from "the date the action occasioning the retrial becomes final." In reversing the original convictions, the court of appeals did not order a retrial. Indeed, the court explained, the Double Jeopardy Clause precluded a retrial on the original indictment since it charged that the Angleton Bank was a member bank of the Federal Reserve System, and the government failed to prove that allegation, proving instead an alternative, but uncharged, jurisdictional basis for the offenses. Pet. App. 10a.

3. The court of appeals correctly ruled that petitioner's second trial was not barred by the Double Jeopardy Clause. Contrary to petitioner's contention, her original convictions were not reversed on the ground of insufficiency of the evidence. The government proved every element of the charged offenses, including the jurisdictional element. Compare *Burks* v. *United States*, 437 U.S. 1 (1978) (government failed to prove the element of intent). Sections 656 and 1005 give alternative bases for establishing federal jurisdiction. The involved bank must be either a "Federal Reserve bank, member bank, national bank, or insured bank." Here, the government proved beyond a reasonable doubt at the first trial that the Angleton Bank of Commerce was an "insured bank," since the evidence showed that it was insured by the FDIC. The first indictment alleged, however, that the Angleton Bank was a "member bank." Therefore, although the government proved every element of the offenses, the government did not prove the specific jurisdictional basis that was charged in the indictment. Thus, there was a variance between the allegation in the indictment and the proof at trial.

The second trial did not give the government a second chance to prove what it failed to prove at the first trial. The second indictment alleged that the bank was an "insured bank," and the government proved that charge. The second trial thus simply cured what the court of appeals had found to be a legal error infecting the first judgment. The correction of that legal error by reindictment and retrial therefore did not violate the Double Jeopardy Clause. See *United States* v. *Ball*, 163 U.S. 662 (1896).[2]

4. Petitioner's speedy trial claim also lacks merit. Relying on Section 3161(e) of the Act, petitioner contends (Pet. 13-15) that she should have been "retried" within 70 days of the issuance of the mandate following the reversal of her original convictions. She could not, however, be "retried" on the original indictment. Because Section 3161(e), by its plain terms, applies only to "retrial[s]," it has no application here.[3]

The court of appeals correctly determined that Section 3161(d)(1) applies in the unusual circumstances of this case.[4] That section provides that the 70-day period for

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[2] For that reason, the decision below does not conflict with either *United States* v. *Shively*, 715 F.2d 260 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984), or *United States* v. *Platenburg*, 657 F.2d 797 (5th Cir. 1981), on which petitioner relies. There was no double jeopardy issue in those cases, because in both there was only one trial. And unlike the instant case, there was no variance in the trials in *Shively* and *Platenburg*; there was simply a failure of proof. In each case, the indictment alleged that the pertinent bank was federally insured. The government attempted to prove that allegation but fell short in its proof. The government did not prove an alternative basis for federal jurisdiction, as it did here.

[3] Even if the second trial is denominated a "retrial" and Section 3161(e) applies here, the 70-day period does not begin to run until "the action occasioning the retrial becomes final." In this case, the return of the second indictment was the "action occasioning the retrial," since petitioner could not be retried on the original indictment. Accordingly, even if Section 3161(e) is applicable to this case, the second trial was timely.

[4] Although petitioner disagrees with the court of appeals that this case is a "novel one" (see Pet. 13), she cites no other case like it.

commencing trial begins anew upon reindictment when the original indictment is "dismissed upon motion of the defendant." Petitioner argues that the original indictment was not dismissed on her motion; rather, it was dismissed on the government's motion during the second trial. But this argument exalts form over substance. Petitioner precipitated the dismissal. At petitioner's behest, the court of appeals reversed her original conviction "subject to reindictment" (756 F.2d at 354). In light of that decision, the original indictment effectively became a nullity; in essence, the court of appeals dismissed the indictment even if the dismissal was not recorded on the docket sheet. The government's subsequent motion was therefore made merely as a ministerial matter following petitioner's victory in the court of appeals. Petitioner's trial commenced within 69 days of the return of the second indictment, and the Act therefore was not violated.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1987

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[5] *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), does not aid petitioner. In *Harris*, the original indictment was dismissed after a superseding indictment was returned. The court held that Section 3161(d)(1) applies only when an indictment is dismissed and *thereafter* a superseding indictment is returned. *Id.* at 1454. In *Harris*, the original indictment had not been constructively dismissed by any court prior to the return of the superseding indictment. In contrast, the court of appeals in this case constructively dismissed the original indictment long before the second indictment was returned. Accordingly, the *thereafter* requirement of *Harris* was satisfied.

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